No. 2650

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

IN ADMIRALTY

LOUIS BUTTNER,
Libelant and Appellant,

vs.

MARY A. ADAMS et al.,
Respondents and Appellees.

BRIEF FOR APPELLANT.

H. W. HUTTON,
Proctor for Appellant.

Filed
MAR 7 — 1916
F. D. Monckton
Clerk

Filed this.....day of March, 1916.

FRANK D. MONCKTON, Clerk.

By.....Deputy Clerk.

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Statement of Facts.

In this case, Louis Buttner, the appellant was a seaman on board of the American schooner "Americana" whose home port was the Port of San Francisco, he shipping for a voyage from that place to Knappton in the State of Washington. The vessel was defectively equipped, having a defective windlass on board, and on the voyage he became entangled in some gear wheels on the windlass, and being dragged in by its intermittent rotation, the

mate of the vessel had to cut his arm off with a knife and razor, to save his life.

The vessel was owned by the Pacific Shipping Company, a California corporation, and he filed his libel herein against all of the stockholders of that corporation.

This action is one *for damages for a tort* and the libel.

Paragraph I sets forth the incorporation of the "Pacific Shipping Company", its residence, and ownership of the "Americana".

Paragraph II sets forth the laws of the State of California respecting the liability of stockholders of a corporation.

Paragraph III sets forth the number of shares of the subscribed capital stock of the "Pacific Shipping Company", and the respective holdings of the respondents.

Paragraph V sets forth the hiring of the libelant.

Paragraph V sets forth the negligence of the Pacific Shipping Company in sending the vessel to sea, it being therein described in detail the defects in the windlass, the nature of the injures to libelant, and the amount of his damage, which is set at *$25,000.00.*

Paragraph VIII sets forth that an action can be commenced under the laws of the State of California, on such a liability, within three years "after the liability is created", and that he had commenced

an action against the Pacific Shipping Company, in the Superior Court of the State of California, in and for the City and County of San Francisco, praying damages for the same injuries, and had recovered judgment in amount $5000.00, and $88.10 costs; that the said Pacific Shipping Company had become bankrupt during the pendency of the action, and the judgment could not be made.

The prayer is for $25,000.00 damages, and for judgment against the stockholders according to their respective holdings.

There being no statutes of limitation in admiralty, the matter about the judgment was simply pleaded to show there had been no laches and that is the only effect it could have, as the action was upon the original liability for the tort, and the court so found (page 17 of Transcript).

> "In this action the libelant seeks to recover from the respondents, forty-five in number, the sum of $25,000 *as damages* for injuries received on January 29th, 1913, on the sailing vessel 'Americana'."

Exceptions to the libel were filed, the third reading (pages 14 and 15):

> "It appears from said libel that the libelant elected to bring suit in the Superior Court of the City and County of San Francisco, State of California, and against Pacific Shipping Company, a corporation, and that he procured judgment in said Superior Court against said corporation for an adequate amount as damages, notwithstanding which he is now endeavoring to come into this honorable court of admiralty

> jurisdiction *to assert the same claim sued on in said Superior Court* and it appears that because of the said conduct and election of said libelant to submit himself and his cause of action to the jurisdiction of the Superior Court, his cause of action is not one of admiralty or maritime jurisdiction and cannot be prosecuted in this court."

The lower court sustained that exception, *held in effect if not in terms that the* original cause of action had been merged in the judgment, *and an action upon the original liability would not lie,* but that the suit should have been upon the judgment.

The questions involved in this appeal are:

When a judgment has been obtained by a person against a corporation, and an action for the same thing subsequently commenced against the stockholders, is the subsequent action upon the judgment or upon the original liability?

Argument.

I.

THE LIABILITY OF A STOCKHOLDER IS A PRIMARY LIABILITY.

This court has so decided in the case of Dolbear v. Foreign Mines Investment Co., 196 Fed. 646.

In that case an action was pending against the corporation and another action was commenced against the stockholders. It was claimed that two actions could not be maintained. This court held directly to the contrary, directly holding that the

liability of the stockholder was a primary liability. Under that decision libelant's libel was properly filed upon the original liability.

For additional cases in point,

Thomas v. Mathieson, 232 U. S. 222,

where the U. S. Supreme Court said:

"The defendant was a principal debtor."

Citing approvingly,

Hyman v. Coleman, 82 Cal. 650.

In that case it was held:

> "It is settled law in this state that, under our constitution and statutes, each stockholder of a corporation is liable for his proportion of the corporate debts contracted while he was a stockholder as a principal debtor, and not as a surety." (Cases cited.)

The liability commences *and a right of action* accrues *against the corporation and stockholders at the same time.*

> "Suspension of the remedy against the corporation does not suspend the remedy against or affect the liability of the stockholders. *A judgment against the corporation does not create a new liability* nor extend the time prescribed by the statute for bringing suit against the stockholders."

It was that language that was before the U. S. Supreme Court, in the above case. For additional authorities we cite:

Young v. Rosenbaum, 39 Cal. 646;

Morrow v. Superior Court, 64 Id. 383;

Faymondville v. McCullough, 59 Id. 285;
Hunt v. Ward, 99 Id. 612;
Knowles v. Sandercook, 107 Id. 629.

It will be remembered that the Constitution of this state reads in part:

> "Each stockholder of a corporation is individually and personally liable for such proportion of all its *debts and liabilities* * * *"

The code section is somewhat similar to statutes of other states, most of them reading debts. It has been held, however, that *debt* was broad enough to cover an action for a tort. In this state, however, no such question can arise as we have the word *liabilities.*

Liability is synonymous with *responsibility* and liability includes responsibility for torts.

Richardson v. Harmon, 222 U. S. 96.

A liability, *responsibility for a tort,* against the stockholders of the corporation, owner and operator of the "Americana", arose in this case. The lower court, however, held that there was no liability until a judgment was recovered, and that that, then, became the liability.

Without a liability in the first instance, there could be no judgment. The judgment did not create the liability, it was the negligence. *The judgment was simply the measure of damages for the liability, or the monetary amount of the liability.*

II.

A JUDGMENT DOES NOT MERGE THE LIABILITY.

The learned court held (pages 18 and 19):

> "*But the judgment is now the measure of respondents' liability*, and if this action were permitted to proceed at all it could proceed only for the amount of the judgment. This being so the action cannot be regarded as a suit on the original and indefinite claim for damages, which was of a maritime character, but in reality as an action on a judgment not of maritime character."

The judgment was neither the measure of the stockholders' liability nor did it in any way affect it. The law is well settled that a judgment does not merge or in any way affect the liability.

The law is correctly stated in the case of Young v. Rosenbaum, 39 Cal. 646, cited by this court approvingly in Dolbear v. Foreign Mines Investment Company, 196 Fed. 646, where it is said:

> "Had the judgment been proven, it would not have constituted a bar to the action. The stockholders are not sureties of the corporation, but are principal debtors. *A judgment against the corporation does not extinguish or suspend the liability of the stockholders, and it clearly does not merge it.*"

Larabee v. Baldwin, 35 Cal. 155, 168.

> "The claim of the respondent *that the judgment is itself a contract creating a new debt*, within the meaning of the statute, for which all who were stockholders at the date of the rendition of the judgment are personally liable, *is too absurd to require argument to refute it.*"

Hunt v. Ward, 99 Cal. 612, 613.

> "The complaint bases the right to recover on the making of the note *and the judgment* against the corporation; but, as the liability of a stockholder *is a separate and independent one, commencing with and dependent upon the original indebtedness,* it is doubtful if the averments of the complaint in the case at bar are sufficient.'

See also, to the same effect:

Stilphen v. Ware, 45 Cal. 111;
Nielsen v. Crawford, 52 Cal. 248;
Winona Wagon Co. v. Bull, 108 Id. 1, 5;
Herman v. Hecht, 116 Id. 553, 561.

Trippe v. Huncheon, 82 Ind. 307.

In that case a judgment had been obtained against a corporation and it was held that suit must be brought, as it was in this case, on the original liability—*not upon the judgment.*

In Morrow v. Superior Court, 64 Cal. 386, cited in respondent's answer to petition for a rehearing, it is said on page 386:

> "The liability of the stockholder is, in our opinion, as distinct and separate from that of the corporation, as it would be if the act had made no provision for any other liability than that of stockholders for the debts of the company."

This action is on tort on the original liability. The judgment had nothing to do with the matter except for the purpose of showing there was no laches. If counsel thought it had no place in the

pleading, they should have excepted for impertinent matter.

III.

THE DISTRICT COURT HAD JURISICTION OVER THE ACTION FOR TORT.

The tort occurred on the high seas, on a California vessel. The laws of the state were applicable and endowed all on board. On a stockholder's liability a person can sue in any court having jurisdiction.

In Flash v. Conn, 109 U. S. 371, it is said:

> "The right of the plaintiff to sue upon the liability in any court having jurisdiction is therefore clear. Dennich v. Railroad Co., 103 U. S. 11."

Whitman v. Oxford National Bank, 176 U. S. 565;

Huntington v. Attroll, 146 Id. 657;

Selig v. Hamilton, 234 Id. 657.

A tort on navigable waters is always within the admiralty jurisdiction. The statute in question *places the responsibility for the tort,* not for the judgment.

State statutes operate on the high seas in cases of tort, and a court of admiralty will enforce a right given by the local law of the vessel's domicile.

Moses v. Laurence City Bank, 149 U. S. 303;

The Corsair, 145 U. S. 335;

Stern v. La Compagnie Etc., 110 Fed. 996;
Aurora Shipping Co. v. Boyce, 112 C. C. App. 373;
Wack v. Thompson, 100 C. C. App. 57;
Darragh v. Wetter, 78 Fed. 7-14.

In the case of Crowley v. Northern Pacific R. R. Co., 159 U. S. 582, it is said:

> "Although the statute of a State or Territory may not restrict or limit the equitable jurisdiction of the Federal Courts and may not enlarge such jurisdiction, it may establish new rights or privileges which the Federal Courts *may enforce on their equity or admiralty side,* precisely as they may enforce a new right of action given by statute upon their common law side,"
> * * *

The Hamilton, 207 N. Y. 398.

State statutes operate on the high seas.

Wilson v. McNamee, 102 U. S. 572;
Crapo v. Kelly, 16 Wall. 610.

IV.

THIS WAS NOT A FINAL JUDGMENT AND COULD NOT BE SUED ON.

The judgment in this case was given and made September 15, 1914. The libel was filed about three months later. A judgment rendered in a California court *does not become final for six months* and, in the event of an appeal, not until the appeal is decided.

Vermont Marble Co. v. Black, 123 Cal. 21.

This judgment not being final, how, for that reason, could it affect this case? Supposing it had been appealed from, which it has; supposing that results in a reversal, what will the liability of the stockholders be then?

If the suit was upon the judgment and an appeal tied the judgment up until three years after the liability accrued, after the damage was done, libelant could not sue at all, as then it would be barred by the statute.

Some of the states have different laws. The law of this state is the best as, under it, a party does not have to wait for a judgment and, again, it is a better protection to the stockholders. Suppose the board of directors of a corporation confessed judgment in the Superior Court for any amount claimed whether correct or not, and the judgment was binding on the stockholders, what position would it place them in? The law of this state gives the stockholder a right to defend on the merits of the original liability and is the most equitable and fair.

There were good reasons for commencing this action in admiralty court. In the state court two actions would have been necessary on account of the statutory limits to court's jurisdiction; one would have to be commenced in the justice's court, the other in the superior court. In an admiralty court all could be joined in one action.

We submit that the lower court misapprehended the nature of a stockholder's liability in this case,

and that the decisions that have construed the statute are uniformly opposed to the ruling in this case.

In this case *the parties were different.* The foundation of the action was the same, but libelant could have recovered a much greater judgment if the proof warranted it. Additional damages might have been shown. The amount recovered against the corporation has nothing to do with what the stockholders might pay; they might have shown lesser damages and might have entirely defeated the action. This they have the right to try and do on a trial. So what has the judgment to do with this case?

There are some authorities cited in the answer to the petition for a rehearing in the transcript.

In Hyatt v. Collins, 55 Fed. 267, an action was brought in ejectment. Judgment went for the defendant. The plaintiff moved for a new trial, obtained one, dismissed the case, and then brought an action in the federal court. The parties were the same, the merits had been decided against the plaintiff and he wished to try another court. That is not this case; the parties are not the same, he prevailed and by reason of the fact that the respondents herein will not pay a debt they honestly owe, he is forced to sue them to compel them to do so.

Bailey v. Willeford, 126 Fed. 803.

That case had various stages. After losing out several times however in the state court, plaintiff

endeavored to secure an injunction to prevent the enforcement of the judgment.

We could not find anything in Forsyth v. Hammond, 156 U. S. 507, that has anything to do with this case.

Pacific Surety Co. v. L. & S. T. & W. Co., 151 Fed. 440, was an action on a bond given to enforce a charter party. The court held that while the charter party was maritime, the bond was not. In other words the original liability was maritime, but the secondary was not. *This case is on the original liability.*

We will say, however, that it has been held in this circuit to the contrary of what was held in the above case.

This action was not upon the judgment. It could not have been brought on the judgment. The judgment had nothing to do with the case, except to show there was no laches, and it was properly pleaded for that purpose. Without the allegation the libel would have been subject to exceptions. The action is upon the original liability for tort, and we submit the decision of the lower court should be reversed, and it should be directed to overrule the exceptions.

Dated, San Francisco,
March 6, 1916.

Respectfully submitted,

H. W. Hutton,
Proctor for Appellant.

ADDENDA.

In our brief, the case of "The Hamilton" is given as 207 N. Y. 398. It should be 207 U. S. 398, and on page 405, it is said:

> "We pass to the other branch of the first question: whether the state law, being valid, will be applied in the admiralty. Being valid it created an obligation, a personal liability of the owner of the Hamilton to the claimants. * * * This, of course, admiralty would not disregard, but would respect the right when brought before it in any legal way."

In the quotation from Freeman on Judgments found on page 4 of appellee's brief, we find:

> "The cause of action, though it may be examined to aid in interpreting the judgment, can never again become the basis of a suit between the same parties."

The parties are different in this case.

Section 9 of Black on Judgments, a quotation from which appears on page 5 of appellee's brief, treats on whether a judgment upon a tort is a contract or not. It has nothing to do with a stockholder's liability.

Hawkins v. Glenn, 131 U. S. 319,

was a case where a judgment went against a corporation and an attempt made to make the judgment from unpaid stock assessments. It was held that the unpaid assessments were the property of the

corporation and the decree could not be collaterally attacked.

The general doctrine in the other cases cited is to the effect that, where a party has sued in the State Court, failed to prevail and then went to the Federal Court with the same case and same parties, that, as the issues, parties and evidence were the same, and the results would in all probability be the same, that the Federal Court would not entertain the case for the reason that plaintiff's *case had no merit.*

In this case, where plaintiff did prevail, and the parties are different, by a parity of reasoning, libelant is properly in the Federal Court.

We respectfully submit that there is no distinction between a case of tort arising from a breach of duty of an employer to furnish proper appliances, and any other case. There is a breach of the contract of employment in such a case.

All the judgment in such a case decides is that there was negligence, the amount of the judgment being the measure of damages.

The negligence creates the liability and is the primary liability.

In action for breach of contract the judgment simply establishes there has been a breach and judicially determines the amount of the damages suffered.

In an action for a disputed debt the judgment establishes that there was a debt and establishes the amount thereof.

There is no observable difference in either action. One cause of action is just as indeterminate as the other and there is no ground on which to hold that an action for negligence is any different to any other action, in so far as the primary liability is concerned.

But still in the light of all of the foregoing, the judgment of the Superior Court was not *res adjudicata,* and is not now *res adjudicata.* The action in which it was rendered is not final.

> People v. Bank of San Luis Obispo, 159 Cal. 65-81.
>
> "An action, under section 1049 of the Code of Civil Procedure, is to be deemed pending while an appeal from the judgment is pending, *or until the time for such an appeal has expired,* but when the judgment upon the appeal has been determined by an affirmance of the judgment, *or when the time for appeal has expired,* the judgment is admissible in evidence as *res adjudicata* and to raise an estoppel in bar of the action."

The record does not show an appeal was pending. An appeal was, however, taken after the libel herein was filed; but the time in which to take an appeal had not expired, so for that reason, if for no other, libelant could only sue on the primary liability. But still the law is clear, that

a judgment whether final or not, does not in any way affect the liability of a stockholder, and has nothing whatever to do with a stockholder's liability.

Respectfully submitted,

H. W. Hutton,

Proctor for Appellant.